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COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2018-SC-000194

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF REVENUE and
DANIEL P. BORK, in his official capacity as
Commissioner of the Department of Revenue, **APPELLANTS,**

On Transfer from the Kentucky Court of Appeals
Case No. 2018-CA-000585

v.

SARAH R. MOORE, **APPELLEE.**

BRIEF OF APPELLANTS COMMONWEALTH OF KENTUCKY, DEPARTMENT OF REVENUE, AND COMMISSIONER BORK

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief was served via First Class Mail upon the following on December 26, 2018: E. Douglas Richards, 836 Euclid Ave., Suite 321, Lexington, KY 40502; William L. Davis, 108 Pasadena Dr., Suite 200, Lexington, KY 40503; Kevin Henry, Bryan Beauman, and Joshua Salsburey, 333 W. Vine St., Suite 1500, Lexington, KY 40507; William E. Thro, Univ. of Kentucky, 301 Main Building, Lexington, KY 40506; Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Vincent Riggs, Fayette Circuit Clerk, 120 N. Limestone St., Suite C-103, First Floor, Lexington, KY 40507. I further certify that the record was checked out and returned to the Clerk's office.

Matthew F. Kuhn

INTRODUCTION

This case initially involved routine debt collection issues, but it mushroomed into a constitutional crisis when the Fayette Circuit Court inexplicably held that the Kentucky Department of Revenue cannot collect debts owed to the University of Kentucky because UK is not part of the executive branch of state government. This holding must be reversed because it is plainly contrary to history, practice, logic, and—most importantly—*the law*.

STATEMENT CONCERNING ORAL ARGUMENT

The Department of Revenue respectfully requests oral argument and believes that oral argument will help illuminate the weighty constitutional and statutory issues involved in this case.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Fayette Circuit Court's decision in this matter disrupts a crucially important statutory practice that the University of Kentucky Hospital ("UK HealthCare") has used to collect bad debts for the last decade. Specifically, the circuit court held that the Department of Revenue (the "Department") cannot collect debts for the University of Kentucky ("UK") just like the Department does for other state agencies because UK is not part of the executive branch of state government.

The Department—acting pursuant to express statutory authority—has collected debts for UK HealthCare since 2008. In fact, by the close of the fiscal year ending in June 2017, the Department had collected $47,662,929.60 on behalf of UK HealthCare. This is obviously no small amount. But the Fayette Circuit Court's holding threatens to destroy the efficacy of this important debt collection method. And, in doing so, the holding not only runs contrary to history and practice, but it is also plainly contrary to the law. Moreover, it threatens to disrupt the operations of all state universities that rely on the Department for debt collection. Accordingly, the circuit court's judgment should be reversed.

A. Statutory and regulatory background

In 2003, the General Assembly amended KRS 131.130 to allow the Department to enter into an agreement with *any* state agency, board, corporation, institution, or other state organization for the purpose of collecting its debts. Before this amendment, KRS 131.130(11) simply allowed the

Department to collect child-support obligations on behalf of the Cabinet for Families and Children. But, after the 2003 amendment, KRS 131.130(11) allowed the Department to "enter into annual memoranda of agreement with any state agency, officer, board, commission, corporation, institution, cabinet, department, or other state organization to assume the collection duties for any debts due the state entity" and to "renew that agreement for up to five (5) years." 2003 Kentucky Acts, ch. 135, Section 1.

A year later, the Kentucky General Assembly enacted KRS 45.237 and 45.238. *See* 2004 Kentucky Acts, ch. 192. These new statutes created a framework under which the Department acts as the collection arm of state government agencies in much the same way as the Department does with Kentucky taxes. Initially, the statute provided in KRS 45.238(3) that all funds collected would go into the budget reserve trust fund under KRS 48.705, an account within the general fund. But in 2008, the statute was amended to allow the Department to return the monies collected to the agency to which the debt was owed. *See* 2008 Kentucky Acts, ch. 44, § 1.

KRS 45.237(1)(a) defines a state "agency" for which debts can be collected by the Department as "an organizational unit or administrative body in the executive branch of state government as defined in KRS 12.010." And KRS 45.237(a)(d) defines a "debt" that can be collected under KRS 45.238 as "[a] sum certain which has been certified by an agency as due and owing." Under this definition, agency debts are differentiated from the tax debts that

the Department has historically collected. Instead of the Department determining what amounts are owed—as it does with taxes—the statute places that responsibility on the agency for whom the debt is to be collected. The Department's responsibility under the statute is limited to collecting debts that have been "certified" as legally "due and owing."

The Finance and Administration Cabinet has adopted regulations to facilitate the implementation of this statutory scheme. First, 103 KAR 1:070 sets forth "uniform collection procedures" for agencies that refer debts to the Department for collection. Under this regulation, an agency must provide the debtor with "written notification that is sufficient to insure that the debtor understands the nature of the debt." *Id.* § 2(2). This notification must include "[d]etail specifically identifying the debt," information about whom to contact regarding questions about the debt, and where to send payment. *Id.* § 2. In the event that the debtor does not respond satisfactorily to the written notification of the debt, the regulation also requires the agency to attempt to contact the debtor by telephone, and it further requires the agency to attempt to negotiate a payment plan with the debtor. *Id.* § 4. Finally, the agency is required to inform the debtor of the appeals process available for contesting the validity of the debt. *Id.* § 2(3)(b). In short, the regulation requires the agency to make multiple attempts to contact the debtor through multiple methods, it requires the agency to try to negotiate a payment plan with the debtor, and it affords the debtor an opportunity to contest the debt. The

regulation does not allow the agency to take money unilaterally from the debtor without notice and an opportunity to be heard.

And even after the debt is referred to the Department for collection, the debtor has still-further administrative appeal rights. The Department's regulations allow for notice and protest of any "assessment, refund denial, or refund deduction." 103 KAR 1:010 §1. After receiving the required notice from the Department, the debtor has the right to file a written protest and request a conference with the Department. *Id.* §§ 2-3. Thus, it is only after the debtor has been afforded a plethora of due process rights that the Department is able to collect the debt.

B. The Department begins collecting UK HealthCare's debts.

The Department entered into an agreement with Central Kentucky Management Services ("CKMS"), an entity wholly controlled by UK, to collect UK HealthCare's debts in May 2006. The agreement provided that it should run from July 1, 2006 and continue until June 30, 2007, but also provided that "[t]hereafter this Agreement will be subject to the provisions of KRS 45.237 et seq. so long as the parties agree to continue this program." [ROA Vol. 2 at 243-48].

In 2015, the Department and CKMS entered into a new agreement for the collection of UK HealthCare's debts. This agreement provided that the parties may renew it for "up to five (5) years." [ROA Vol. 2 at 249].

Under its statutory and contractual relationship with UK HealthCare, the Department has collected considerable amounts on debts UK HealthCare certified as due and owing. By the close of the fiscal year ending in June 2017, the Department had collected $47,662,929.60 on behalf of UK HealthCare, including the collections fee that the Department is authorized to receive pursuant to KRS 45.238(3).

C. The Department's collection of the Appellee's debts to UK HealthCare.

According to the Amended Complaint, Appellee Sarah R. Moore visited a UK HealthCare facility for treatment of herself or her minor children five times over the course of 2011 and 2012. [ROA Vol. 1 at 33-35]. UK's practice following these visits was to send the Appellee bills telling her that if she wished to dispute the validity of the bills she needed to contact UK within 30 days. [ROA Vol. 2 at 306-10]. The Appellee never contacted UK to dispute the validity of her bills. After UK certified the Appellee's 2011 UK HealthCare debts as due and owing to the Department, the Department issued her a "Final Notice Before Seizure" on March 17, 2012. This Notice showed a total of $6,766.42 owed from the Appellee's 2011 UK Healthcare visits. [ROA Vol. 2 at 239-40]. Similarly, after UK certified the Appellee's 2012 UK HealthCare debts as due and owing to the Department, the Department issued the Appellee a "Final Notice Before Seizure" on March 13, 2014. This Notice showed a total of $15,599.08 owed from the Appellee's 2012 UK HealthCare

visits. [ROA Vol. 2 at 241-42]. The amounts due in both cases were composed of the original hospital charges, a statutory cost of collection fee, and interest.

The "Final Notices Before Seizure" that the Department sent to the Appellee were similar to those sent by the Department to tax debtors. These Notices informed the Appellee that, to avoid seizure action, full payment must be received by the Department by a date certain. [ROA Vol. 2 at 241-42]. The Appellee was informed that seizure action could include attachment of bank funds, wages, and the offset of tax refunds. [ROA Vol. 2 at 239-42]. The Notices also informed the Appellee that "[i]f you believe that all or a portion of your debt is not past due or is not legally enforceable, you may, within 45 days from the date of this notice, present evidence to support your position." [*Id.*]. However, the Appellee never contacted the Department to dispute the validity of her debts. As a result, the Department began levy action to collect the debts. [ROA Vol. 2 at 303]. In 2016, the Appellee entered into a voluntary payment agreement with the Department to pay $25.00 per week. After the Appellee commenced this action, the Department voluntarily suspended all collection action against her.

D. Procedural history.

The Appellee filed suit against the Department, Commissioner Daniel P. Bork, the University of Kentucky, and UK's Executive Vice President for Health Affairs in February 2017. The original Complaint sought a declaratory judgment under KRS 418.040 that UK was not an "Agency" under KRS

45.237(1)(a) and could not legally refer debts to the Department. [ROA Vol. 1 at 1-11]. It also raised contractual claims against UK, including breach of the implied covenant of good faith and fair dealing, federal and state constitutional claims against UK and the Department, and it also sought monetary damages. [*Id.*]. After UK and the Department both filed motions to dismiss, the Appellee filed an Amended Complaint that abandoned every cause of action except the request for a declaratory judgment. Specifically, the Amended Complaint sought "a judgment declaring that UK HealthCare and the University may not legally refer debts to [the Department] for collection," and "that the Department . . . may not legally undertake efforts to collect the debt allegedly owed by the Plaintiff or similarly situated persons." [ROA Vol. 1 at 31-38].

The Appellee subsequently filed a motion that simply requested the Fayette Circuit Court to declare that the "University of Kentucky is not an agency, organizational unit, or administrative body in the executive branch of state government; that the University may not lawfully refer the accounts of UK HealthCare to the defendant, Commonwealth of Kentucky, Department of Revenue for Collection under KRS 45.237 et seq.; and that the Department of Revenue may not lawfully collect such amounts." [ROA Vol. 2 at 151-163].

The Fayette Circuit Court held a hearing on this motion on February 2, 2018. During the hearing, the circuit court focused on the meaning of legislation from 1952 that removed UK from the Department of Education. Prior to 1952, KRS 156.010(3) provided that "[t]he University of Kentucky" and

various state colleges "are included in the Department of Education and constitute divisions thereof, but each shall continue to exercise all the functions conferred upon it by law." In 1952, however, the General Assembly repealed KRS 156.010(3). 1952 Ky. Acts, ch. 28, Section 3. In its place, the law was changed to provide:

> Anything in any statutes of the Commonwealth to the contrary notwithstanding, the power over and control of appointments, qualifications, salaries and compensation payable out of the State Treasury or otherwise, promotions and official relations of all employees of the University of Kentucky, as provided in KRS 164.220, and, subject to any restrictions imposed by general law, the retirement ages and benefits of such employees, shall be under the exclusive jurisdiction of the Board of Trustees of the University of Kentucky, which shall be an independent agency and instrumentality of the Commonwealth.

Id., § 1.

The Fayette Circuit opined that its "very best interpretation" of this statutory change "is that the legislature really did speak back in 1952 when they separated out the different universities, established a board of trustees, did set them up as independent groups and by statute took them out of the Department of Education which was clearly an executive branch of state government." [ROA Vol. 3 at 454; VR 3:39:47]. Thus, in the view of the Fayette Circuit Court, removal of UK from the Department of Education necessarily meant that UK was no longer part of the executive branch. In other words, the Fayette Circuit Court conflated removal from the Department of Education with removal from the executive branch as a whole.

Examining this Court's opinion in *Beshear v. Bevin*, 498 S.W.3d 355 (Ky. 2016), the Fayette Circuit also stated that "one can certainly read that to hold that universities are not part of the executive branch of state government." [ROA Vol. 3 at 452; VR 3:31.09]. Later, the Fayette Circuit Court suggested that the Supreme Court was not entirely clear in *Beshear v. Bevin* as to whether UK was or was not part of the executive branch. [ROA Vol. 3 at 454; VR 3:40:24].

The only other judicial authority cited by the Fayette Circuit Court was an unpublished decision of the Franklin Circuit Court—an opinion that had already been vacated by this Court. The Franklin Circuit Court opinion relied upon concerned the ability of the Governor to abolish and reform the Board of Trustees of the University of Louisville under the Governor's reorganization power of KRS 12.028. *See Beshear v. Bevin*, Franklin Circuit Court, 16-CI-738 (Sept. 28, 2016). On the way to its erroneous conclusion that the Governor does not have that ability, the Franklin Circuit Court made a number of statements to the effect that universities were "removed from the organizational structure of the executive branch in 1952." [ROA Vol. 2 at 180-82] On appeal, however, this Court found the Franklin Circuit Court case to be moot, and therefore vacated the Franklin Circuit Court's opinion and remanded the case with instructions that it be dismissed. *See Bevin v. Beshear*, 526 S.W.3d 89, 91 (Ky. 2017).

Despite this fact, the Fayette Circuit Court treated the Franklin Circuit Court's vacated order as legal authority equivalent to this Court's opinion in *Beshear v. Bevin*, 498 S.W.3d 355 (Ky. 2016). Demonstrating that it was conflating the two cases of *Bevin v. Beshear*, 526 S.W.3d 89 (Ky. 2017), and *Beshear v. Bevin*, 498 S.W.3d 355 (Ky. 2016), and confusing the issues involved in each case, the Fayette Circuit stated:

> [T]he *Beshear v. Bevins* cases that we've all talked about and looked at . . . they talked about . . .whether or not these universities are part of the executive branch of state government or not and . . . I wish somebody'd just say they are or they aren't. But you can read that case and I'm not sure exactly . . . but the implication to me is that there are controls over a Governor's – the executive branch's oversight and authority over the UK or any other university. That was . . . U of L or UK or any of these other universities. It's just there are no controls and limitations over their authority. You know if they were truly part of the executive branch, you know the government is head of the executive branch, he or she, whoever the Governor might be from time to time, you know, could say something. But the courts say that they can't.

[ROA Vol. 3 at 454-55; VR 3:40:25]. After this discussion, the Fayette Circuit Court concluded:

> Therefore, based on the court's summation of the pertinent facts and the legal authorities on motion of the Plaintiff for declaratory judgment as to whether or not UK is a state agency within the executive branch of state government, the court answers it in the negative. That is, the court does not believe that UK is part of the executive branch of the state government.

[ROA Vol. 3 at 455; VR 3:40:25].

Tellingly, the Fayette Circuit Court declined to explain which of the three branches of state government UK belongs to if it is not part of the executive branch. Naturally, the Defendants had argued that because "UK is certainly not a member of the legislative branch nor the judicial branch, by default they must be members of the executive branch." But the Fayette Circuit declined to address this issue. [ROA Vol. 3 at 453; VR 3:33:12-41].

Following the February 2, 2018 hearing, the Fayette Circuit Court issued a declaratory judgment on February 12, 2018 holding that "the defendant, University of Kentucky, is not 'in the executive branch of state government for purposes of KRS 45.237 et seq. and KRS 12.010.'" [ROA Vol. 3 at 434]. The circuit court's short order further noted that the court had "expressed the reasons for its decision in open court on February 2, 2018, which reasons are incorporated herein by reference." [*Id.*].

In response to the circuit court's order, both the Department and UK filed motions under CR 59.05 to alter, amend, or vacate the order. [ROA Vol. 3 at 436-47, 474-89]. On March 21, 2018, the Fayette Circuit Court denied those motions, stating "[n]o just cause for delay being shown, this is a final and appealable Order." [ROA Vol. 3 at 528-29]. Both UK and the Department thereafter filed timely notices of appeal. [ROA Vol. 3 at 515-17, 523-25].

ARGUMENT

The primary question in this case is whether UK is part of the executive branch of state government. According to the Fayette Circuit Court, it is not, and therefore it is unable to use the Department to collect its debts. But this is demonstrably wrong for a number of reasons. UK is plainly an agency within the executive branch of state government. There is no valid basis to conclude otherwise, and the Fayette Circuit Court's decision to the contrary must be reversed.

Aside from this point, there is yet another separate and independent reason why the Fayette Circuit Court's decision should be reversed. The circuit court held that UK cannot take advantage of the Department's debt collection services under KRS 45.237 and 45.238 because it is not a "state agency" within the executive branch as defined by KRS 12.010, but the circuit court did not address the significance of KRS 131.130, which provides an additional—and entirely separate—basis on which the Department can collect UK's debts. KRS 131.130 allows the Department to enter into debt collection contracts with any "state organization," not just executive branch agencies. UK is unquestionably a state organization. Under no circumstances can UK be considered a private school. Therefore, its contract with the Department pursuant to KRS 131.130 clearly authorizes the Department to collect UK's debts. The Fayette Circuit Court failed to acknowledge this fact. Thus, at the very least, it must be reversed on this basis.

Finally, the Fayette Circuit Court's decision should be reversed for the additional reasons that the Appellee's claims are barred by sovereign immunity and the Appellee's failure to exhaust administrative remedies.

If not reversed, the Fayette Circuit Court's decision will have repercussions that will reverberate throughout the Commonwealth. Perhaps most significantly, the decision threatens to disrupt the operations of Kentucky's public universities that rely on the Department for debt collection. The Department has collected debts for state universities and other state entities for more than a decade. The amount collected for UK Healthcare alone from July 2009 through June 2017 is in the tens of millions of dollars, and counsel for the Appellee has already filed two separate putative class actions in Franklin Circuit Court against the Commonwealth and several state universities seeking the repayment of that money—and perhaps more. *See Long et al. v. Univ. of Kentucky et al.*, Civil Action No. 18-CI-627; *Bennett et al. v. Univ. of Kentucky et al.*, Civil Action No. 18-CI-975. If left to stand, the Fayette Circuit Court's decision could have disastrous consequences on UK and other state universities.

I. UK is part of the executive branch of state government, and therefore the Department is capable of collecting UK's debts under KRS 45.237 and 45.238.[1]

Even the most basic logical reasoning demonstrates that the Fayette Circuit Court was wrong to conclude that UK is not part of the executive

[1] The Department preserved this issue. [*See* ROA Vol. 3 at 229-35].

branch of state government. There are only three branches of government: judicial, legislative, and executive. All parts of state government must fall within one of those branches. The Kentucky Constitution is very clear about this, as are the opinions of this Court. *See* Ky. Const. §§ 27, 28; *see also LRC v. Brown*, 664 S.W.2d 907 (Ky. 1984). There is no such thing as a fourth branch of government. Nevertheless, by holding that UK is not in the executive branch, the Fayette Circuit Court has essentially created a new, fourth branch of government and placed UK and the other state universities in it. This is the only logical conclusion one can draw from the Fayette Circuit Court's ruling. After all, UK obviously is not in either the legislative or judicial branches. Thus, if it is also not in the executive branch—as the Fayette Circuit Court held—then it must be in some fourth branch. But that is impossible because there is no fourth branch.

This Court explained this point over 30 years ago in *LRC v. Brown*. In analyzing the nature of the Legislative Research Commission, this Court opined:

> KRS 7.090(1) declares that the LRC is an "independent" agency of state government. This does not comport with our previous analysis of the nature of the LRC, nor does it comport with our constitution which recognizes only three branches of government.
>
> *There is, simply put, no fourth branch of government*. The LRC was created by, is controlled by, and is a service type agency of the General Assembly. It is independent of the Governor; it is not subject to reorganization by the Governor, it is subject to the control of its creator, the General

> Assembly. It is an "oversight" and service organization for and on behalf of the General Assembly. As such, it is a part, albeit an important part, of the General Assembly, the legislative branch of government. It is part of the General Assembly by reason of its statutory birth and its statutory nourishing. We therefore, conclude that KRS 7.090(1), which declares the LRC to be an independent agency of state government, is constitutionally invalid.

Brown, 664 S.W.2d at 916-17 (emphasis added).

The Fayette Circuit Court's opinion in this case is contrary to the Constitution for the same reason that this Court found KRS 7.090(1) to be contrary to the Constitution—it essentially establishes UK as an independent branch of government just as KRS 7.090(1) attempted to establish the Legislative Research Commission as an independent branch of government.

The clear lesson from *LRC v. Brown* is that there are only three branches of government, and each state agency must fall within one of those three. It cannot be reasonably argued that UK is in either the judicial or legislative branches. This obviously leaves only the executive branch. By necessity, then, UK *must* be considered a part of the executive branch.

This conclusion is not only dictated by the logic of *LRC v. Brown*, but is also consistent with the manner in which the courts and the General Assembly have historically treated UK. For example, the General Assembly provided in KRS 49.070(1) that "state institutions of higher education under KRS Chapter 164 are agencies of the state." And KRS 164.225 states that UK is "an independent agency and instrumentality of the Commonwealth." Likewise, in

Withers v. University of Kentucky, 939 S.W.2d 340, 343 (1997), this Court explained that UK is "an agency of the state," and that it "operates under the direction and control of central state government." This Court further found that there was "no doubt" that UK met the requirement for sovereign immunity that it be "carrying out a function integral to state government" and be "such [an] integral [part] of state government as to come within regular patterns of administrative organization and structure." *Id.* at 344 (quoting *Ky. Center for the Arts v. Berns*, 801 S.W.2d 327 (Ky. 1997)).

Similarly, the Court of Appeals has quoted approvingly the statement of a circuit court that "'state funded and administered universities are an arm of the state.'" *Galloway v. Fletcher*, 241 S.W.3d 819, 823 (Ky. App. 2007). The Court of Appeals also explained in *Pauly v. Chang*, 498 S.W.3d 394, 402 (Ky. App. 2015), that "[t]he language of KRS 44.073(1) establishes the University of Kentucky as an agency of the state and KRS 446.010(31) defines 'state funds' or 'public funds' in such a manner as to include sums paid to the University of Kentucky Medical Center for health care sciences."

More recently, this Court reiterated in *Beshear v. Bevin*—which was the case dealing with gubernatorial reductions to the state universities' budget allotments—that "Universities are state agencies." 498 S.W.3d at 380. As previously explained, this can only mean that the state universities are part of the executive branch of state government. Indeed, *Beshear v. Bevin* also held that universities are "are attached to the *executive branch* for budgetary

purposes." *Id.* (emphasis added). It would be harder to find a more explicit acknowledgement that the state universities are part of the executive branch of state government. Nevertheless, the Fayette Circuit Court misinterpreted *Beshear v. Bevin* as supporting the Appellee's arguments. Nothing could be further from the truth, though.

The portion of *Beshear v. Bevin* that the Appellee relied upon before the circuit court states that "[a]lthough the Universities are state agencies and are attached to the executive branch for budgetary purposes, *they are not part of the executive branch in the same sense as the program cabinets and boards directly under the Governor's control*." *Id.* at 380 (emphasis added). The Fayette Circuit Court bought the Appellee's argument that this excerpt demonstrates that the state universities are not part of the executive branch in any respect. However, it actually proves the opposite. It does not say that the universities are not part of the executive branch. Instead, it quite plainly says that "they are not part of the executive branch *in the same sense*" as other agencies that are under the Governor's direct control. *Id.* (emphasis added). In other words, it means that the universities *are part of the executive branch*, but that their position in the executive branch is somewhat different than program cabinets and boards directly under the Governor's control.

The issue in *Beshear v. Bevin* was whether the Governor could unilaterally reduce the universities' budget allotments, not whether the universities are part of the executive branch of state government. This Court

resolved that issue by concluding that the Governor could not exercise such unilateral authority. But it is a *non sequitur* to say that this means that the universities are not part of the executive branch. The fact that an agency is not under the direct control of the Governor does not mean that it is not part of the executive branch. For example, the offices of other statewide elected officials, like the Secretary of State and Agriculture Commissioner, are obviously not under the direct control of the Governor, but those offices are obviously part of the executive branch.

Beshear v. Bevin was simply about statutory limitations on the exercise of executive power. In other words, the question before this Court was whether the statutes pertaining to the public universities had removed them from the direct control of the Governor, not whether those statutes had removed the universities from the executive branch. While this Court held that the Governor was statutorily prohibited from reducing the universities' budget allotments, it certainly did not hold that the universities are not part of the executive branch.

This Court also did not issue such a holding in *Bevin v. Beshear*, 526 S.W.3d 89 (Ky. 2017). The issue in that case was whether KRS 12.028 authorized the Governor to reorganize the board of a state university. The Court ultimately did not address that question because it had been mooted by the General Assembly's enactment of Senate Bill 107, which provided "a specific statutory path for a governor to disband and reconstitute a university's

governing board . . . ." *Id.* at 90. Because the case had been rendered moot, this Court dismissed the appeal and ordered the Franklin Circuit Court to dismiss the action with prejudice. *Id.* at 91. Nothing in the opinion supports the proposition that the state universities are not in the executive branch. To the contrary, the opinion actually supports the opposite conclusion. By acknowledging that Senate Bill 107 allows the *Governor* to disband and reconstitute a university's board, the opinion implicitly acknowledges that the universities are part of the executive branch. This Court would not have acknowledged that the Governor possesses such power over an entity within the legislative or judicial branches. Thus, the Fayette Circuit Court's reliance on *Bevin v. Beshear* was erroneous.[2] That case simply does not support the conclusion that the state universities are outside of the executive branch.

Nor is that conclusion supported by the 1952 statutory changes on which the Fayette Circuit Court relied. Those changes, which are now codified in KRS 164.225, provide:

> Anything in any statutes of the Commonwealth to the contrary notwithstanding, the power over and control of appointments, qualifications, salaries, and compensation payable out of the State Treasury or otherwise, promotions and official relations of all employees of the University of Kentucky, as provided in KRS 164.220, and, subject to any restrictions imposed by general law, the retirement ages and benefits of such employees shall be under

[2] To the extent the Fayette Circuit Court relied on the Franklin Circuit Court's opinion in *Bevin v. Beshear*, such reliance was manifestly erroneous. The Franklin Circuit Court's decision had been vacated by that point, with the case having been remanded with instructions that it be dismissed with prejudice.

> the exclusive jurisdiction of the board of trustees of the University of Kentucky, which shall be an independent agency and instrumentality of the Commonwealth.

In the proceedings below, the Appellee seized upon the "independent agency" language in KRS 164.225 as directing that UK is not in the executive branch of state government, [ROA Vol. 2 at 158-61], and the circuit court was apparently persuaded by that argument. But nothing in that statutory language actually removes the universities from the executive branch. The simple fact that the statute refers to the universities as "independent" agencies does not mean that the statute removes them from the executive branch. After all, the Board of Medical Licensure is an "independent board" pursuant to KRS 311.530(1), but no reasonable person would argue that it is not part of the executive branch. More importantly, the Fayette Circuit Court's interpretation of KRS 164.225 runs contrary to this Court's holding in *LRC v. Brown*. As stated in *LRC v. Brown*, "[t]here is, simply put, no fourth branch of government." 664 S.W.2d at 917. But if UK is not in the executive branch, then it is in a fourth branch. Because that manifestly cannot be the case, it *must be true* that UK is in the executive branch. This is the only rational conclusion.

And since UK must be in the executive branch, this necessarily leads to the ultimate conclusion that the Department can collect its debt under KRS 45.237 and 45.238. After all, KRS 45.238(1) provides that the Department can collect the debts of an "agency," and KRS 45.237(1)(a) says that the term

"agency" as used in KRS 45.238 "means an organizational unit or administrative body in the executive branch of state government as defined in KRS 12.010." Thus, under KRS 45.238, the Department can collect the debts of any executive branch entity that constitutes an "organizational unit" or "administrative body." The term "organizational unit" is defined in KRS 12.010 as "any unit of organization in the executive branch of the state government that is not an administrative body, including but not limited to any agency, program cabinet, department, bureau, division, section or office," KRS 12.010(1), and the term "administrative body" is defined as "any multi-member body in the executive branch of state government, including but not limited to any board, council, commission, committee, authority or corporation, but does not include 'branch,' 'section,' 'unit' or 'office,'" KRS 12.010(8). No matter how one views UK, it necessarily fits within one of these two definitions. Accordingly, it is an "agency" for purposes of KRS 45.238, which means that the Department can collect its debts. The Fayette Circuit Court erred in holding otherwise.

II. KRS 131.130(11) permits the Department to collect UK's debts even if KRS 45.237 and 45.238 do not.[3]

Even though it is abundantly clear that the Department can collect UK's debts under KRS 45.237 and 45.238, the Court does not actually have to address this issue in order for the Department and UK to prevail here. And

[3] The Department preserved this issue in its CR 59.05 motion. [*See* ROA Vol. 3 at 486-87]. UK also preserved this issue. [*See* ROA Vol. 2 at 264-65].

the reason for this is simple: KRS 131.130(11) provides a completely separate and independent basis on which the Department can collect UK's debts. Although UK and the Department argued this point before the circuit court, it failed to address the issue in its ruling.

KRS 131.130(11) provides that "[t]he department may enter into annual memoranda of agreement with any state agency, officer, board, commission, corporation, institution, cabinet, department, or other state organization to assume the collection duties for any debts due the state entity and may renew that agreement for up to five (5) years." It further states, that "[u]nder such an agreement, the department shall have all the powers, rights, duties, and authority with respect to the collection, refund, and administration of those liquidated debts as provided under" KRS Chapters 131, 134, and 135, and any other applicable statutory provisions governing the obligee of the debt. KRS 131.130(11). The key point here is that the availability of these statutory debt collection procedures is broader than the availability of procedures under KRS 45.237 and 45.238. Whereas the latter statutes only allow the Department to collect the debts of state agencies, KRS 131.130 permits the Department to collect the debts of both state agencies *as well as* state "institution[s]" and "other state organization[s]." Even if one were to assume that UK somehow does not constitute a state agency—an assumption that is insupportable, as explained above—there is no way to conclude that it also does not constitute

either a state "institution" or a "state organization." In fact, KRS 164.001 defines the term "institution" to include state universities.

The only possible conclusion is that KRS 131.130 authorizes UK to enter into an agreement by which the Department can collect UK's debts. UK has done this since 2006. Accordingly, even if KRS 45.237 and 45.238 do not authorize the Department's debt collection efforts on behalf of UK, KRS 131.130 clearly does. Neither the Appellee nor the Fayette Circuit Court has an answer to this manifestly true proposition.

III. The Appellee's claim is barred by sovereign immunity.[4]

The Department of Revenue is a part of the Finance and Administration Cabinet, which is part of the Commonwealth of Kentucky state government. Under Section 231 of the Kentucky Constitution, "[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." The Appellee desires a monetary judgment against the Department. That has always been the purpose of this lawsuit, [*see, e.g.,* ROA Vol. 1 at 1-11] and as noted, Appellee's counsel is currently pursuing two separate putative class actions for money damages using the same theory presented here. Because a judgment in the Appellee's favor will be used to pursue monetary relief, sovereign immunity bars her claim.[5] *See Green v. Mansour*, 474 U.S. 64, 73 (1985).

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[4] The Department preserved this issue. [ROA Vol. 1 at 101-15; ROA Vol. 2 at 228-36].

[5] Sovereign immunity also applies to Daniel P. Bork, as this action sues him in

Furthermore, the Kentucky Claims Commission has exclusive jurisdiction to hear claims for monetary damages against the Commonwealth. *See* KRS 49.040; KRS 49.060. That is the proper forum for this lawsuit as this declaratory judgment action is merely a stepping stone to a monetary recovery.

IV. The Appellee's claims are also barred due to her failure to exhaust administrative remedies.[6]

The Appellee was notified by UK of the process for disputing the validity of her hospital bills. She failed to dispute any of them prior to filing this action. Although the bills had been certified by UK to the Department as due and owing, the Department's Final Notices Before Seizure stated that she should present evidence to the Department if she believed her debt was not legally enforceable. The Appellee never presented evidence disputing the validity of the debt to the Department. Her failure to exhaust the available administrative remedies bars her claim in this matter.

This Court in *Popplewell's Alligator Dock NO. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456 (Ky. 2004), held that direct declaratory or injunctive relief is inappropriate in the courts where an adequate administrative remedy is available. The Court emphasized that to allow plaintiffs direct access to the courts "undermines and frustrates the important policies and purposes served by the exhaustion rule." *Id.* at 467. Allowing plaintiffs to circumvent the

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his official capacity. *See Yanero v. Davis*, 65 S.W.3d 510, 521 (Ky. 2001).

[6] The Department preserved this issue. [ROA Vol. 1 at 101-15; ROA Vol. 2 at 228-36].

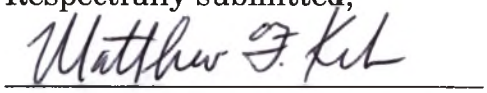
administrative appeal process by requesting a declaratory judgment would mean "that the administrative remedy must amount to an exercise in futility." *Id.* at 468. As this obviously cannot be true, *Popplewell's Alligator Dock* emphasized that declaratory or injunctive relief does not lie when an adequate administrative remedy is available.

It is indisputable that the Appellee never availed herself of the administrative remedies available to her. *Popplewell's Alligator Dock* therefore bars her claim in this matter.

CONCLUSION

The Fayette Circuit Court should be reversed for four separate reasons. First, UK is clearly part of the executive branch of state government. Any other conclusion is contrary to history, practice, logic, *and the law*. As a result, the Department is authorized to collect UK's debts under KRS 45.237 and 45.238. Second, even if one were to put aside those statutes, the Department is still authorized to collect UK's debts under KRS 131.130(11). There is no reasonable basis to reject this point, and—tellingly—the Fayette Circuit Court did not even attempt to do so. Third, the Appellee's claim is barred by sovereign immunity because the point of this case is to establish a basis on which the Appellee—and others—can obtain monetary relief from the Commonwealth. Finally, the Appellee's claim is barred by her failure to exhaust the available administrative remedies.

Respectfully submitted,



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